

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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STATE OF OKLAHOMA, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., et al.	)	
	)	
Defendants.	)	
	)	

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**DEFENDANT TYSON FOODS, INC.’S MOTION TO MODIFY FEBRUARY 26, 2007  
PROTECTIVE ORDER PROHIBITING THE DEPOSITION OF ATTORNEY  
GENERAL W.A. DREW EDMONDSON**

Defendant Tyson Foods, Inc., (“Tyson”) respectfully moves this Court to modify its February 26, 2007, Opinion and Order prohibiting the deposition of Attorney General W.A. Drew Edmondson (“Edmondson”). Specifically, Tyson seeks a modification permitting the deposition of Edmondson regarding the Office of the Attorney General’s independent investigation of the August 2008, E-Coli outbreak in Locust Grove, Oklahoma (the “E-Coli Outbreak”). In the past few weeks, Edmondson has repeatedly given media interviews maintaining that groundwater contaminated with poultry litter was the cause of the E-Coli Outbreak that resulted in one death and numerous illnesses; an opinion apparently shared by no one else in Oklahoma state government. Plaintiffs claim that the findings of Edmondson’s investigation of the E-Coli Outbreak are relevant to the issues in this lawsuit but Edmondson refuses to answer questions under oath about the investigation or his claims. Edmondson’s status as one of dozens of “counsels of record” for Plaintiffs in this lawsuit does not protect him from being subject to the discovery rules in light of his highly publicized “investigation.” He has

personal knowledge regarding an investigation conducted by his office which, according to Plaintiffs, is relevant to the issues in this case. Accordingly, good cause exists for Tyson to be permitted to take his deposition. In support of its Motion, Tyson states as follows:

### **I. INTRODUCTION**

On February 26, 2007, this Court granted Plaintiffs' Motion for a Protective Order (Dkt. No. 1033) preventing defendant Simmons Foods, Inc. ("Simmons") from taking Edmondson's deposition, holding that the deposition was not "currently necessary." 2/26/07 Opinion and Order, 7 (Dkt. No. 1062) (the "Order").<sup>1</sup> According to the Order, Edmondson, serving as Plaintiffs' counsel and a head government official, was not a true party in the action and the circumstances of the case at that time did not warrant his deposition. *Id.* at 2-6. Further, the Court stated that Federal Rule 30(b)(6) provided an adequate avenue for Simmons to obtain the information it sought. *Id.* at 3-4.

The circumstances, however, have changed. Edmondson has personally interjected himself into the State of Oklahoma's investigation of the Locust Grove E-Coli Outbreak. While other state agencies with actual regulatory responsibility over public health issues conducted their investigations, Edmondson began his own "independent" effort to connect the Outbreak to the poultry industry. In mid-February 2009, Edmondson released the "findings" of his investigation. Relying on the same experts hired by his private counsel for this lawsuit, Edmondson contrived a connection between the Outbreak and the poultry industry and has

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<sup>1</sup> Although the notice that resulted in the Court's February 26, 2007, Order was issued by a separate defendant, Plaintiffs contend that the Court's order bars all attempts by all Defendants to depose General Edmondson on any and all issues that may arise in this lawsuit. Tyson does not read the Court's Order that broadly. However, once Plaintiffs raised the argument that the deposition sought by Tyson was somehow barred by this Court's prior Order, the parties agreed that the proper and least confrontational means for resolving this dispute would be for Tyson to file a motion to modify the prior Order. *See* Ex. 1, March 16, 2009, e-mail from L. Bullock.

implemented a constant and misleading campaign to convince the public of the poultry industry's responsibility. While some members of the press have questioned Edmondson's claims and his motives, a recent poll conducted by a Northeast Oklahoma newspaper found that Edmondson's media blitz about Locust Grove has tainted the views of many residents of Northeast Oklahoma. *See Ex. 2, Hear Case in Court*, Muskogee Phoenix, March 17, 2009, ("Edmondson appears to be tainting the well of public opinion when it comes to his lawsuit against the Arkansas poultry companies . . . Sixty-one percent of callers in a recent Phoenix readers' poll said that poultry waste probably is contaminating wells.").

The time has come for Edmondson to step away from the microphone and testify under oath about his investigation of Locust Grove and his repeated public claims that this unfortunate E-Coli outbreak was caused by poultry litter. Counsel for Plaintiffs have confirmed that they consider Edmondson's investigation relevant to this lawsuit and have indicated their intent to introduce "evidence" obtained or generated as part of that investigation at trial, but nonetheless, Plaintiffs refuse to produce Edmondson for a deposition on this topic. *See Ex. 1*. Tyson has conferred in good faith with Plaintiffs in an effort to secure deposition testimony from Edmondson without Court intervention but Plaintiffs have refused to allow the deposition absent an order from this Court. *See Ex. 1*. Plaintiffs have agreed to expedited consideration of this motion by the Court in light of the approaching discovery deadline (i.e., April 15, 2009). *See Ex. 1*.

## II. BACKGROUND

In late August 2008, an E-Coli Outbreak occurred near Locust Grove, Oklahoma, leading to one death and over 300 reported illnesses. The Oklahoma State Department of Health ("OSDH") and the Oklahoma Department of Environmental Quality ("ODEQ") began their

investigations, tracing the Outbreak to the Country Cottage Restaurant in Locust Grove, and identifying the strain of E-Coli causing the Outbreak as E-Coli O111, a rare strain typically associated with cattle manure or human feces. Despite testing several surfaces, food items, stool specimens from employees, and well water samples, no specimens from the Country Cottage yielded the E-Coli O111 strain. *See Ex. 3, Situation Update No. 17: Outbreak of Severe Diarrhea Illness in Northeastern Oklahoma*, OSDH, 11/20/08. Without a positive identification of the strain's origin, OSDH has thus far been unable to rule out any possible sources of the E-Coli and agency representatives have indicated that their final report would contain no "smoking gun." *See Ex. 4, Who said that? Someone is misquoting*, Pryor Daily Times, 3/5/09.

In September, 2008, while the OSDH and ODEQ were conducting their investigations, Edmondson began his own independent investigation of the Outbreak and directed the Attorney General Office's Environmental Protection Unit ("EPU") to investigate "a possible link between the land application of poultry waste and the August 2008 E-Coli outbreak." The EPU, though organized under the broad mandate of protecting Oklahoma's natural resources and providing legal representation to state environmental agencies, has focused much of its recent attention on Edmondson's lawsuit against the Defendants. *See Ex. 5*, at 2-3. On February 13th, Edmondson released his "findings" in a press conference. At the press conference, Edmondson circulated a media package that included a memorandum from an attorney in his office and a PowerPoint presentation detailing his investigation. *See Ex. 6 and 7*.<sup>2</sup> Edmondson claims that his office has "concluded that the Country Cottage well is, and has been, contaminated with poultry waste and

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<sup>2</sup> The PowerPoint distributed by General Edmondson to the media was a sensational media stunt that is frankly unbecoming of a government official. It included a photograph of a young boy lying critically ill in a hospital bed, a Tyson logo and the name of a contract grower for Tyson who has never been connected to the tragic outbreak but who happens to own a farm several miles away from the Locust Grove restaurant. *See Ex. 7*, at 8 and 18.

associated bacteria, including E-Coli,” and that “it is possible that the well and its poultry-waste-contaminated groundwater was a source of the outbreak.” *See* Ex. 6, at 2. Edmondson also claimed in his media package that the “specific strain causing the outbreak, E-Coli O111, has been found in poultry waste.” *Id.* Edmondson’s media package includes numerous “findings” similar to the unsubstantiated allegations raised in this lawsuit that are strongly contested by defendants.

In response to Edmondson’s “report,” ODEQ conducted additional sampling of water wells in and around Locust Grove. These samples showed a small number of wells containing strains of E-Coli other than the O111 strain that had been identified as the cause of the Outbreak (i.e., E-Coli strains O141, O179, and O113). None of the wells sampled by ODEQ contained the “rare and virulent E-Coli O111” responsible for the Outbreak. *See* Ex. 8, *Deadly E. coli O111 absent from sampled wells*, Tulsa World, 3/12/09. Rather than acknowledge that groundwater likely was not the cause of the E-Coli O111 Outbreak given ODEQ’s inability to find that strain in groundwater in the area, Edmondson stood by his investigation and reflexively blamed the existence of these other forms of bacteria on the poultry industry. Referring to the three strains found in local wells in an interview given to the Associated Press, Edmondson stated, “I think so, but I’m not prepared to say with the strength that I did on Country Cottage that (poultry litter pollution) is the likely source.” *See* Ex. 9, *Okla. AG: Litter Could be cause of other bacteria*, Associated Press, 3/13/09.

Since releasing his “findings” on February 13, 2009, Edmonson has embarked on a constant campaign to blame the poultry industry for the Outbreak and to discredit and demean any state agency or official who cast doubt on his allegations. *See, e.g., Attorney General claims poultry litter likely caused E. coli outbreak*, Tulsa World, 2/13/09; *Oklahoma DEQ to*

*Sample Private Water Wells*, Associated Press, 2/13/09 (“Despite an Oklahoma Health Department Finding that poultry litter was probably not the source of a deadly E-Coli outbreak last year in northeast Oklahoma, Attorney General Drew Edmondson is blaming Arkansas poultry farms.”); *Edmondson links litter, E. coli cases*, Tulsa World, 2/14/09 (“Edmondson said that based on a months-long investigation by his environmental protection unit, it appears that poultry litter spread as fertilizer made its way into an unpermitted well that the popular restaurant had been using.”); *Official cites litter in death from café*, Arkansas Democrat Gazette, 2/15/09 (“Attorney General Drew Edmondson blames chicken manure used as fertilizer near a restaurant for causing a disease outbreak that led to the death of a man from Pryor, Okla.”); *AG looks for E-Coli Poultry Link*, The Daily Times, 2/16/09; *Disagreement over poultry contamination*, Joplin Grove, 2/17/09 (“Attorney General Edmondson says it is ‘highly likely’ that well water polluted by poultry litter was to blame for a deadly E-Coli outbreak last year, but his evidence is circumstantial and state health officials wouldn’t comment on his claims.”); *Study: Poultry Industry potential cause of E-Coli outbreak*, Edmond Sun, 3/3/09; *Mayor Criticizes Oklahoma AG amid E-Coli probe*, Forbes, 2/3/09 (“The mayor of Locust Grove is criticizing Oklahoma Attorney General Drew Edmondson, accusing him of unfairly attacking his community by suggesting a deadly E-Coli outbreak could have been caused by contamination from nearby poultry farm.”); *Charges fly over E-Coli case*, Tulsa Word, 3/4/09; *AG: Agency ‘botched’ E. coli hunt*, Tulsa World, 3/10/09; *State Agency Responds to AG’s Remarks*, NewsChannel 9, 3/10/09 (“The state health department said Tuesday it was ‘disheartening’ to hear comments from Attorney General Drew Edmondson claiming the agency ‘botched’ its probe into an unsolved E-Coli outbreak that killed one man and sickened hundreds more.”); *Rhetoric ramping up as E. coli question persist*, The Oklahoman, 3/11/09; *E. coli strain inside Locust Grove wells not linked to*



*outbreak*, Tulsa World, 3/12/09; *Deadly E. coli O111 absent from sampled wells*, Tulsa World, 2/12/09; *Okla. AG: Litter Could be cause of other bacteria*, Associated Press, 3/13/09 (collectively attached as Ex. 10). Edmondson's untrue and irresponsible claims about the Outbreak and his investigation should be tested in discovery before anyone attempts to offer evidence relating to these matters at trial.

### III. ARGUMENT

Edmondson's joint role as both Attorney General for the State of Oklahoma and Plaintiffs' counsel in this case should not prevent Defendants from taking his deposition on the limited issue of his independent investigation of the Locust Grove E-Coli Outbreak. His personal knowledge regarding his independent investigation falls outside the protections normally granted to opposing counsel and head government officials.

#### A. **Edmondson's Independent Investigation of the Locust Grove E-Coli Outbreak satisfies the *Shelton* Standards for taking a deposition of Opposing Counsel**

This Court should not permit Edmondson to avoid a deposition on the limited issue of his office's independent investigation of the Locust Grove E-Coli Outbreak due to his status as one of dozens of counsel of record for Plaintiffs in this case. This Court granted Plaintiffs' Motion for a Protective Order based in part on *Shelton v. American Motors Corp.*, which held "that depositions of opposing counsel should be limited to where the party seeking to take the deposition has shown that: (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." 805 F.2d 1323, 1327 (8th Cir., 1986). These standards are met for the limited purpose of deposing Edmondson on his independent investigation of the Locust Grove E-Coli Outbreak.

**1. No other means exist for gathering this information**

When granting the Protective Order, this Court found that Simmons, which was attempting to depose Edmondson as a representative of the State of Oklahoma in its entirety, failed to meet the first *Shelton* factor because other means existed for obtaining the information, namely, through serving Plaintiffs with Federal Rule 30(b)(6) deposition notices. After serving these notices, Plaintiffs would designate and produce for deposition a person knowledgeable about each issue. That rationale does not apply in this limited situation.

The ridiculous claims made by Edmondson are *his* claims, not the claims of the State of Oklahoma. The real environmental agencies that Edmondson has publicly and improperly accused of “incompetence” do not share his belief that every tragic event that occurs in Eastern Oklahoma must have been caused by “out of state” poultry companies. OSDH is unwilling to say that poultry litter caused the Outbreak. Ex. 11, *Study: Poultry industry potential cause of E. coli outbreak*, The Edmond Sun, 3/3/09 (“[Leslea Bennett-Webb, a spokeswoman for the OSDH] declined to comment on whether linking the breakout to poultry waste is a reasonable conclusion or just conjecture.”). ODAFF, the agency charged with regulating the use of poultry litter as a fertilizer was “extremely skeptical of [Edmondson’s] investigation” and “would not take any administrative action” based upon his “findings.” Ex. 6, at 5-6. The State of Oklahoma does not speak with a unified voice on this subject and thus a 30(b)(6) notice to the “State” would be of little use to Tyson. Moreover, it is impossible to conceive of a situation where there is someone “more knowledgeable” about Edmondson’s investigation and his public claims than Edmondson himself. The alternative device of a 30(b)(6) notice simply will not work with respect to the questions that Tyson needs answered.



While Edmondson freely discusses his independent investigation with reporters across the country, his dual status as Plaintiffs' counsel and the Attorney General should not permit him to avoid discussing his investigation and those comments under oath with the Defendants. Though Edmondson serves as opposing counsel in this case, he also continues in his role as Attorney General for the State of Oklahoma. It is in this role that he ordered and supervised the investigation into whether the Locust Grove E-Coli Outbreak was caused by the application of poultry litter. Defendants are not asking to depose Edmondson as a representative of the State on the multitude of issues in this case. Defendants are not seeking to perform a fishing expedition and question Edmondson on issues for which other state officials are more knowledgeable. Rather, Defendants seek a deposition of Edmondson regarding the investigation he directed to connect the E-Coli Outbreak in Locust Grove to the poultry industry.

## **2. The information sought is relevant and non-privileged<sup>3</sup>**

Counsel for Plaintiffs have admitted that they consider Edmondson's investigation of the E-Coli Outbreak relevant to this case and have indicated their intention to introduce the information at trial. *See* Ex. 1. Further, on their own accord, without requests or prompting from Defendants, Plaintiffs produced sampling data from Locust Grove as part of their routine sampling production in this case. *See* Ex. 12.<sup>4</sup> Though Defendants question Edmondson's motive in performing his investigation into the E-Coli Outbreak, his investigation is independent from the lawsuit and not privileged due to his status as an attorney in this case. As noted in

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<sup>3</sup> Given the numerous public comments by Edmondson and the dissemination of an internal memorandum from attorneys in his office to the media detailing the investigation, Tyson does not believe that Plaintiffs will assert a claim of privilege relating to Edmondson's personal knowledge of his investigation. If that position is taken by Plaintiffs in their response, Tyson will address privilege and waiver issues in its reply.

<sup>4</sup> It is worth noting that Locust Grove is not even in the IRW. Thus, the voluntary production in this case by Plaintiffs' of sampling results from the Locust Grove E-Coli investigation.

Simmons' Response to Plaintiff's Motion for a Protective Order (Dkt. No. 1045), Defendants have no desire to waste time and resources asking Edmondson questions which seek to invade legitimate privileges. Tyson only wishes to depose Edmondson on his independent investigation of the E-Coli Outbreak, the findings of the investigation, and the basis for his public statements regarding this issue.

### **3. The information is crucial to the preparation of the case**

Edmondson is desperate to locate a single individual with a water-borne illness caused by poultry industry in the Illinois River Watershed ("IRW"). Having failed in the IRW, he has expanded his search to other parts of Oklahoma. In Locust Grove, Edmondson found an E-Coli outbreak with high publicity, and, like most of Northeastern Oklahoma, there are chicken houses "nearby" if you are willing, like Edmondson, to stretch "nearby" to mean within 5 miles. Exploiting the personal tragedy of hundreds of people for his own ends, Edmondson combined the power of the Attorney General's Office with the biased and unreliable "science" created by his legal team for this lawsuit in an attempt to fill one of many holes in his attack on the poultry industry.

Due to the implications of his investigation, Edmondson's deposition on this topic is crucial to Tyson's preparation. Tyson and its experts will explain to the jury that there has never been a documented case of water-borne bacterial disease associated with poultry litter. If Edmondson's response to this undeniable claim will be, as Tyson anticipates, to point to his own investigation and "findings" in Locust Grove, Edmondson's claims must be tested and subject to cross examination. The vast majority of the "findings" explained in the memorandum distributed by Edmondson to the media in mid-February include statements on issues highly contested by Defendants in this case. The materials Edmondson included in his media packet and the

“findings” of his investigation, serve as a *de facto* and publicly released expert report, which may require additional discovery, rebuttal reports, *Daubert* Motions, and hearings.

**B. Edmondson’s personal knowledge of the investigation outweighs the protection afforded to a head government official**

As Attorney General for the State of Oklahoma, this Court held that General Edmondson is protected from deposition “absent the necessity of discovering relevant factual information” in his possession. 2/27/07 Opinion and Order, at 5-6. In *Church of Scientology of Boston v. Internal Revenue Service*, cited by the Court in its Order, an exception to this rule exists when a top government official has “direct personal factual information pertaining to material issues in the action.” 138 F.R.D. 9, 12 (D. Mass., 1990). The Court further analogized to a Northern District of Oklahoma case dealing with a high-level corporate officer and noted that such a person is protected from deposition unless the officer “has unique personal knowledge about the controversy.” *Evans v. Allstate*, 216 F.R.D. 515, 518-19 (Okla. 2003). When a lawyer possesses relevant facts and those facts cannot be obtained from other sources, a deposition of the lawyer is proper. *Shelton*, 805 F.2d at 1327.

Edmondson’s personal knowledge regarding his independent investigation of the E-Coli Outbreak satisfies this exception. Edmondson has made himself a fact witness.<sup>5</sup> He alone knows why he chose to disrupt the investigations of other agencies for the purpose of his personal crusade against the poultry industry. He alone knows why he said the things he said publicly about this topic and the basis, if any, for statements that jeopardize the ability of the Defendants to obtain a fair trial in this venue.

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<sup>5</sup> Despite the fact that Edmondson is a lawyer and the Attorney General, he has been deposed as a fact witness in prior litigation. See Ex. 13, Edmondson Depo. Tr. in *West v. Burch*, CIV-03-1019-T, WD. Okla. The State and Mr. Edmondson, while perhaps inconvenienced, survived.

#### IV. CONCLUSION

By Plaintiffs' own admission, they consider the evidence created through Edmondson's independent investigation of the Locust Grove E-Coli Outbreak relevant to this lawsuit and Plaintiffs' counsel have further indicated their intent to introduce the evidence at trial, though they now refuse to confirm this intent in writing. *See* Ex. 1. Despite this admitted belief that the evidence is relevant, Edmondson now seeks to protect this evidence by invoking this Court's February 27, 2007, Order preventing Tyson from taking his deposition. The policies in place to protect opposing counsel and high government officials were not meant to allow this type of gamesmanship. The nature of this evidence demands discovery. Edmondson has personal knowledge regarding the independent investigation he spearheaded and Tyson should be able to depose him on this limited issue.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on the 23 day of March 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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